

**BEFORE THE  
RURAL UTILITIES SERVICE  
DEPARTMENT OF AGRICULTURE  
WASHINGTON, DC 20250-1560**

**In the Matter of**

**The Launching Our Communities'  
Access to Local Television Act  
of 2000**

**Public Law 106-553**

**To: Roberta D. Purcell  
Assistant Administrator, Telecommunications Program  
Rural Utilities Service  
United States Department of Agriculture  
1400 Independence Avenue, S.W.  
Stop 1590, Room 4056-S  
Washington, D.C. 20250-1590**

**Joint Comments of the National Rural Telecommunications Cooperative,  
the National Rural Electric Cooperative Association and  
the National Rural Utilities Cooperative Finance Corporation**

The National Rural Telecommunications Cooperative ("NRTC"), the National Rural Electric Cooperative Association ("NRECA"), and the National Rural Utilities Cooperative Finance Corporation ("CFC") (together the "Rural Interests") are again pleased to submit these Joint Comments concerning the implementation of the Launching Our Communities' Access to Local Television Act of 2000 ("the LOCAL Act" or "Act")<sup>1</sup> by the Rural Utilities Service ("RUS")<sup>2</sup>.

1. Together our three organizations represent consumers in more than 2,700 rural counties covering 70 percent of the land area of the United States. Our members are rural electric cooperatives, telephone cooperatives, independent commercial telephone companies, and

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<sup>1</sup> See *The Launching Our Communities' Access to Local Television Act of 2000*, Pub. L.No.106-553 (2000).

<sup>2</sup> See *Communities' Access to Local Television; Notice of Inquiry*, 67 Fed. Reg. 21,216 – 21,217 (Released April 30, 2002) ("Notice").

affiliates. These rural utilities offer vital services including electricity, telephone, water, wastewater, television, Internet access, and other vital services to rural communities. Not-for-profit and community-oriented organizations are in the best position to deliver local TV signals, as envisioned by the LOCAL Act.<sup>3</sup>

2. On April 13, 2001, the Rural Interests submitted comments regarding the implementation of the LOCAL Act.<sup>4</sup> While there are certain changing market conditions, including the pending proposed Merger of the two major direct broadcast satellite (DBS) providers (which we will discuss more fully later), the most important issues and conditions that led to passage of the LOCAL TV Act remain unchanged. Millions of rural households do not have access (or only have limited access) to local broadcast signals from over-the-air, cable or DBS sources. None of the current potential changes in the industry should cause the RUS to

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<sup>3</sup> NRTC is a not-for-profit cooperative comprised of 1,109 rural electric cooperatives, rural telephone cooperatives, independent rural telephone companies, and non-member affiliates located throughout 48 states. Since its founding in 1986, NRTC's mission has been to meet the telecommunications needs of American consumers living in rural areas. NRTC, its members and affiliates currently market and distribute DIRECTV programming to more than 1,700,000 rural households using DBS technology. Additionally, NRTC has entered into agreements with Hughes Network Systems and StarBand Communications, Inc. to distribute high-speed Internet service by satellite to rural Americans through its members. NRTC also provides dial-up Internet access, 220 MHz wireless services, long distance telephone services, automated meter reading, and other telecommunications services to its members and affiliates who in turn provide these services to consumers located throughout rural America.

NRECA is the national service organization dedicated to representing the interests of more than 900 consumer-owned cooperative electric utilities and the consumers they serve. As the national leader of rural electric cooperatives, the association provides member assistance through legislative representation before the United States Congress, the Executive Branch, and in legal and regulatory proceedings affecting electric service and the environment. NRECA also offers education and training programs for cooperative directors, managers, and employees. It offers insurance, employee benefits, financial services, technical research and advice, and electrification assistance in developing countries around the world. NRECA's electric cooperative and public power district members serve 34 million people in 46 states.

CFC is a not-for-profit cooperative whose mission is to provide its member utility systems with an assured source of low-cost private capital and state-of-the-art financial products. CFC meets its owners' financing needs through a variety of loan, investment, member service, and specialized financing programs. By maintaining high credit standards and credit ratings, CFC provides its owners with competitively priced financing through its role as a conduit to the private capital markets. CFC primarily raises funds in three ways: through equity investments made by its cooperative utility owners, through securities issued to member-owners, and by raising funds in the capital markets. CFC serves electric cooperatives and their affiliated organizations with a total membership of 1,046.

<sup>4</sup> See Joint Comments of the National Rural Telecommunications Cooperative, the National Rural Electric Cooperative Association and the National Rural Utilities Cooperative Finance Corporation, submitted in response to *Communities' Access to Local Television; Request For Information*, 66 Fed. Reg. 14,880 – 14,881 (submitted April 13, 2001) (*Rural Interest Comments*).

delay issuing regulations to implement the LOCAL Act loan guarantee program in a timely fashion. The loan program that Congress created is as necessary now as it was when the LOCAL Act became law on December 21, 2000.

3. Rural residents have waited too long for access to their local TV signals. We are pleased to present our views on how the provision of local signals can be accomplished in an efficient manner through the LOCAL Act. It is our continued belief that satellite technology offers the best method for serving the households currently without access to local TV signals.

**I. The Proposed Merger of DIRECTV and EchoStar Should not Delay or Substitute For RUS Implementation of the LOCAL Act Regulations.**

4. On October 29, 2001, General Motors Corporation announced its intention to sell Hughes Electronics Corporation to EchoStar Communications Corporation (EchoStar). Hughes' assets include DIRECTV, which controls 46 DBS frequencies at the three full continental United States ("CONUS") orbital slots. If the Merger is approved by regulators, the entity that would be created by the proposed Merger ("New EchoStar") would control all 96 frequencies at all three full-CONUS orbital slots.<sup>5</sup>

5. New EchoStar initially announced its intention to serve the top 100 Designated Market Areas ("DMAs"), proudly touting that these 100 markets serve "at least" 85 percent of the U.S. population.<sup>6</sup> Later, in February 2002, New EchoStar revised its proposal and petitioned

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<sup>5</sup> Petition to Deny of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348, pp. 5-6 (filed February 4, 2002) (*NRTC Petition*).

<sup>6</sup> Application to the Federal Communications Commission, EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor; and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control, File Number 01-348, Summary p. i (filed December 3, 2001) (*Application*).

the FCC for authorization to launch "New EchoStar 1," a new spot beam satellite designed to augment earlier-launched satellites to provide local signals to all 210 DMAs.<sup>7</sup>

6. The RUS should not delay action on the LOCAL Act loan guarantee program based on any assumption that the proposed Merger will be approved by the Federal Communications Commission ("FCC") or the Department of Justice ("DoJ") or, if approved, will resolve the issue of rural local broadcast signal availability.

7. NRTC and many others believe that the proposed Merger is inconsistent with the antitrust laws and contrary to the public interest under the Communications Act.<sup>8</sup> The effect of the proposed EchoStar/DIRECTV Merger is readily apparent: for the tens of millions of consumers living in areas where cable is not available, the number of comparable multichannel video program distributors ("MVPDs") would be reduced from two (EchoStar and DIRECTV) to one (New EchoStar); in areas where cable is available, the number would be reduced from three (EchoStar, DIRECTV and the local cable operator) to two (New EchoStar and the local cable operator).<sup>9</sup>

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<sup>7</sup> EchoStar Satellite Corporation and Hughes Electronic Corporation, Application for Authority to Launch and Operate New EchoStar 1 (USABBS-16), S2435, File No. SAT-LOA-20020225-00023 (February 25, 2002); *See also* Letter to William F. Caton, Acting Secretary, Federal Communications Commission from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation and Gary Epstein, Counsel for Hughes Electronics Corporation, providing supplemental Technical Annex, dated March 28, 2002 (*New EchoStar 1 Application*).

<sup>8</sup> In addition to the *NRTC Petition*, Petitions to Deny were filed by the National Association of Broadcasters (*NAB Petition*), Pegasus Communications Corporation (*Pegasus Petition*), the American Cable Association, Paxson Communications, Univision Communications Inc. (*Univision Petition*), Carolina Christian TV, Inc. and LeSea Broadcasting Corporation, Johnson Broadcasting, Inc., the Word Network, the Communications Workers of America, Eagle III Broadcasting, LLC, Family Stations, Inc., Northpoint Technology, Ltd., the American Cable Association, and the National Consumers League, National Farmers Union and National Grange (*Consumers League Petition*). In addition, Comments opposing the merger were filed by the National Rural Electric Cooperative Association (*NRECA Comments*), Primetime 24 Joint Venture (*Primetime 24 Comments*), Pappas Telecasting Companies (*Pappas Comments*), the American Antitrust Institute (*AAI Comments*) and approximately 40 others. In response to the overwhelming opposition to the proposed Merger, Hughes and EchoStar filed an Opposition to Petition to Deny and Reply Comments on February 25, 2002 (*Applicants' Opposition*). Finally, on April 4, 2002, NRTC filed an ex parte Reply to the *Applicants' Opposition* (*NRTC Reply*).

<sup>9</sup> *NRTC Petition*, p. v.

8. Similarly, cable modem or digital subscriber line facilities do not pass approximately 40 million homes, leaving businesses and rural consumers that need high-speed Internet with no access to this service except via satellite.<sup>10</sup> Currently, there are only two competing providers of broadband satellite services using the Ku-band: StarBand, with a large equity interest from EchoStar,<sup>11</sup> and DIRECWAY, owned by Hughes. The proposed Merger would combine these two entities and create an unregulated monopoly in the delivery of broadband services to rural Americans. It also would create an overwhelmingly dominant player in the delivery of advanced broadband services in the promising Ka-band, before any other competitors can get off the ground.

9. Many industry experts say the proposed Merger stands little or no chance of gaining FCC and DoJ approval. For example, financial analyst William Kidd of Lehman Brothers, recently wrote that his firm believes the probability of merger approval is "less than 50

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<sup>10</sup> *NRTC Petition*, p. vi. See also National Telecommunications and Information Administration and Rural Utilities Service, *Advanced Telecommunications In Rural America: The Challenge of Bringing Broadband Service to All Americans*, April, 2000, pp. 18-21 (*NTIA/RUS Report*). Recent analysts' reports show some increase in cable modem and DSL availability. For instance, The Yankee Group estimates that 66 percent of U.S. households had access to cable modem service at the end of 2001. See *Cable Modem Providers Continue to Lead the High-Speed Internet Charge: The Yankee Group's Predictions on Consumer Broadband Service*, August, 2001, p.4. J.P. Morgan estimates that 73 percent of households have access to cable modem service, and 45 percent of households have access to DSL, with a combined broadband availability of 85 percent. These figures do not, however, show broadband availability in the local market. In Comments recently filed with NTIA, the Minnesota Department of Administration noted that there are still areas in major metropolitan markets, such as Minneapolis-St. Paul, where neither cable modem nor DSL services are available. In rural areas, smaller independent telephone companies have deployed DSL service to approximately 70 percent of their exchange areas, but larger telephone companies have not invested in DSL in rural areas. The Department noted that Qwest, the largest ILEC in Minnesota, has deployed DSL service to only nine percent of its rural exchanges, mostly in larger towns. The Department also stated that cable modem service is rarely available beyond the city limits of rural towns. See Comments of Minnesota Department of Administration. These statistics are more illustrative of the state of broadband deployment in local rural markets.

<sup>11</sup> Yuki Noguchi, *StarBand Files Suit Against EchoStar, Satellite Firms at Odds Over Billing*, Washington Post, May 24, 2002, at E-5 (noting that EchoStar Communications Corp. is StarBand Communications Inc.'s largest shareholder).

percent.”<sup>12</sup> Armand Musey of Salomon Smith Barney, downgraded an initial 40 percent estimated probability to 20 percent.<sup>13</sup>

10. One of the reasons analysts give for low approval probability is the fact that the proposal would eliminate competition for MVPD and high-speed Internet subscribers in rural areas. Many parties who participated in the FCC’s recent proceeding concerning the proposed Merger showed the severe negative impact the Merger would have on rural consumers throughout the country: much higher costs, decreased customer service, reduced programming options and a chilling effect on the deployment of new technologies.<sup>14</sup> The Rural Interests addressed these and other issues in their respective comments filed with the FCC regarding the proposed Merger.<sup>15</sup>

11. Several other rural and consumer-protection organizations also have filed in opposition to the proposed Merger, including the National Grange, the National Farmers Union, the National Consumers League, and several rural TV broadcast licensees.<sup>16</sup>

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<sup>12</sup> Lehman Brothers, William Kidd, *EchoStar: Looks Attractive Going into Quarter*, p. 1 (April 19, 2002).

<sup>13</sup> Salomon Smith Barney, Multi-Company Note, *Satellite Communications & Towers, FCC Filings Point to Antitrust Issues Facing DISH/GMH Merger*, p. 1 (February 8, 2002).

<sup>14</sup> See *Primetime 24 Comments*, pp. 4-5 (EchoStar would have a virtual monopoly on MVPD services in areas not served by cable); *NAB Petition*, pp. 5-6, 44-49; *Pegasus Petition*, pp. 15-21 (in rural and other areas where digital cable is not available, EchoStar’s acquisition of DIRECTV is a merger to monopoly); *NRECA Comments*, pp. 1-9 (the loss of MVPD competition will particularly disadvantage rural Americans); *AAI Comments*, p. 2; *Pappas Comments*, pp. 15-16; Comments of Aiken Electric Satellite TV, Inc. pp. 1-2; *Consumers League Petition*, pp. 1-3. See also Letter from Senator Max Baucus, Montana, to Michael Powell, Chairman, Federal Communications Commission (December 26, 2001) (noting that 30 million Americans and 130,000 Montana residents lack access to cable); Letter from Senator Max Baucus, Montana, *et al.* to Michael Powell, Chairman, Federal Communications Commission and Attorney General John Ashcroft, Department of Justice (May 17, 2002).

<sup>15</sup> A summary of the *NRTC Petition* is attached as **Exhibit 1**; a copy of NRECA’s Comments, filed February 4, 2002, is attached as **Exhibit 2**; and a copy of CFC’s Comments, filed February 25, 2002, is attached as **Exhibit 3**.

<sup>16</sup> See *Consumers League Petition*, pp. 1-3 (stating the merger would “create a single national provider of MVPD service, reduce competition from two companies to one”).

12. These and other documents ably outline the many defects in the proposed Merger. The Rural Interests believe that federal regulators will find too many defects and adverse impacts on the public to allow the proposed Merger to go forward.

13. Even if the Merger were approved, according to the New EchoStar 1 Application it will take New EchoStar two years or more to complete the project.<sup>17</sup> Moreover, the New EchoStar 1 project is nothing more than an unfulfilled promise at this point. To what extent might New EchoStar let that timetable slip, or delay full service to the 210 DMAs while disputing some interpretation of the order? EchoStar's past history suggests a tendency toward such tactics.

14. For example, the FCC recently found in a separate proceeding relating to EchoStar's compliance with the carriage of local channels, that EchoStar failed to abide by a Congressionally mandated FCC must-carry order on a timely basis. In its finding, the FCC characterized EchoStar's past behavior as follows:

*EchoStar has previously been fined by the Commission for rule violations and admonished for its "disingenuous" behavior and lack of candor. In June 1998, the Commission fined EchoStar . . . the maximum forfeiture amount permitted . . . The FCC justified the forfeiture amount based on EchoStar's degree of misconduct, lack of voluntary disclosure and continuing violation of the Commission's rules. In November 1999 . . . the Commission assessed a forfeiture against EchoStar, finding that it had willfully violated the Communications Act and the Commission's rules, that it had been "disingenuous" in its legal interpretations . . . In August 2001, the Commission found that "EchoStar failed in its duty of candor" by withholding information from the Commission.*<sup>18</sup>

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<sup>17</sup> *New EchoStar 1 Application*, p. 3.

<sup>18</sup> Declaratory Ruling And Order, *In the Matter of National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, CSR-5865-Z, n. 116 (released April 4, 2002) (citations omitted).

15. In short, EchoStar's promises cannot be believed.<sup>19</sup> The RUS cannot rely on EchoStar's so-called promise of local service in all 210 DMAs. When the unreliability of EchoStar's promises of future conduct is taken together with the low probability of FCC and DoJ approval, it is highly unlikely that the proposed Merger will have any reliable influence on the timely provision of local satellite TV service in rural America. Other entities in the satellite TV industry will be required to build and launch satellites to provide rural local TV service, and they will need access to the LOCAL Act loan guarantee program.

## **II. New Technologies Reinforce the Case for DBS as the Most Cost-Effective Method for Reaching Rural America.**

16. Satellite technologies, like all high-tech sectors, benefit from advances that improve existing services or bring entirely new services to the marketplace. Farms, ranches and other agricultural-based businesses need the full range of video and high-speed data services equivalent to those available in urban and suburban areas. So do small-town government and civic associations, rural tourist-related businesses, and the growing segment of "teleworkers" who find that they can do their jobs just as effectively in rural America as they would in an urban downtown office building.

17. Satellite-based technologies are advancing to meet these needs. Once RUS finishes implementing the LOCAL Act loan guarantee program, satellite providers can begin using the program to extend advanced services to *all* Americans.

18. One of the most important steps forward occurred on November 26, 2001, when DIRECTV launched DTV 4S, its first spot beam satellite.<sup>20</sup> As soon as the new satellite became

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<sup>19</sup> For a brief summary of some of EchoStar's "Flip Flops" on issues of material importance related to the proposed Merger see *NRTC Reply*, pp. 4-10 (Attached Hereto as **Exhibit 4**).

<sup>20</sup> DIRECTV 4S was launched to the 101° W.L. orbital slot on November 26, 2001. See *Boeing's DIRECTV 4S* Web Site [http://www.hughespace.com/factsheets/601/directv\\_4s/directv\\_4s.html](http://www.hughespace.com/factsheets/601/directv_4s/directv_4s.html) (visited May 29, 2002).

operational, DIRECTV was able to transfer the transmission of local TV signals in the 41 DMAs it now serves from CONUS beams on other satellites to the 26 spot beams on DTV 4S, which represented a major step forward in DBS spectrum efficiency. Since the DTV 4S launch, EchoStar has launched a similar spot beam satellite to increase its efficiency. Both DIRECTV and EchoStar plan to launch additional spot beam capability later in 2002.

19. The improved efficiency arising from greater spot beam deployment frees the use of CONUS beams for new services. For example, DirecTV launched DIRECTV 5 on May 8, 2002, to replace the aging DirecTV 6 satellite. In addition, DIRECTV plans to use the new satellite to augment its current line-up of high-definition television (HDTV) program offerings.

20. The ubiquitous nature of satellite technology represents the best option available to implement the goals and intentions of the LOCAL Act, which include high-speed Internet access as well as local signals to all markets.<sup>21</sup> Satellite distribution technology is uniquely situated for less-populated, remote areas with difficult geographic terrain.

21. Satellite services other than DIRECTV or EchoStar may offer a long-term possibility of rural local signal distribution. On April 25, 2002, SES Americom, Inc. (SES) filed a Petition for Declaratory Ruling with the FCC, proposing to provide DBS service from the 105.5° W.L. orbital slot beginning as early as 2004.<sup>22</sup> SES has stated that it will operate as a wholesaler by leasing transponder capacity to retail distributors of video, broadband and advanced services. Assuming SES Americom's proposed service is technically feasible and can

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<sup>21</sup> *Rural Interest Comments*, pp. 5-7. See also *LOCAL Act*, §§ 1002, 1004(e)(1)(B).

<sup>22</sup> SES Americom, Inc. Petition for Declaratory Ruling To Serve the U.S. Market Using BSS Spectrum From The 105.5° W.L. Orbital Location, April 25, 2002. Currently, the 105.5° W.L. orbital slot is not authorized for DBS use in the United States. SES' Gibraltar affiliate has secured rights to this slot through an authorization issued by Gibraltar, a British protectorate.

overcome domestic and international regulatory hurdles, it offers a potential platform to assist in bringing local TV to rural areas via satellite. However, it is *at best* several years away from implementation.

22. Rapid developments in chip technology for set-top boxes also promise to promote the delivery of local signals by satellite. For example, the Broadcom Corporation recently announced a single chip decoder that enables unmatched functionality for DBS set-top boxes.<sup>23</sup> The chip is optimized to enable advanced functions for DBS users and includes personal video recording (PVR) functionality, a high performance processor, an advanced graphics engine and significant mixed signal integration. Essentially, it incorporates an entire satellite receiver and a PVR onto a single chip that sells for \$50 in lots of 10,000. This and other developments in chip technology and set-top boxes could facilitate the creation of open platforms for the delivery of multiple local signals by satellite.

23. Cable penetration rates in rural areas lag far behind those in urban areas. Up to 25 million households are beyond the reach of cable.<sup>24</sup> For millions of rural consumers who do not have access to digital cable or digital subscriber line (DSL) services, satellite is the only provider of MVPD service and high-speed Internet access.

24. Some companies plan to deploy ground-based wireless, line-of-sight technologies to retransmit local television signals in several bands, including some services that would share

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<sup>23</sup> *Broadcom Demonstrates Highest Level of System Integration for Next Generation Satellite Set-Top Boxes*, MediaCast Show, PRNewswire-First Call, May 21, 2001.

<sup>24</sup> *Look, Up in the Sky! Big Bets on a Big Deal*, N.Y. Times, October 30, 2001, at C-1 (reporting that of 115.9 million homes with access to satellite, only 90.9 million had access to cable. Based on these figures, some 25,000,000 homes may not be passed by cable). See also *NTIA/RUS Report*, n. 62 (noting that up to 21 million homes may not be served by cable). See also *NRTC Petition*, pp. 5-20.

the same 12 GHz frequencies utilized by DBS licensees.<sup>25</sup> The Rural Interests have obvious concerns over potential interference in the 12 GHz band. At the same time, the Rural Interests note that all fixed wireless technologies in all bands where the FCC has authorized video transmission (including the 2 GHz, 28 GHz, and 39 GHz bands) require costly investment in infrastructure. For ground-based technologies to provide service to small, rural areas, they must dedicate an inordinate amount of time, money, and manpower. Fixed wireless carriers have yet to demonstrate the economic feasibility of their technologies in rural America.<sup>26</sup>

25. While ground-based wired and fixed wireless carriers must slowly build video and Internet capability – rural community by rural community – current Ku-band satellite carriers blanket the continental United States with digital TV service and with an ever increasing list of HDTV, pay-per-view, video on demand and local TV offerings. We respectfully suggest that RUS would best serve rural America by guaranteeing loans for technologies that will cover the greatest number of underserved households in the most cost-effective manner possible. There is no question that satellite technology holds the greatest promise.

### **III. RUS Now Has the Opportunity to Go Forward With a Fully Funded LOCAL Act Program.**

26. In its Notice,<sup>27</sup> RUS asks about the level of assistance it could provide rural America with the \$258 million it was authorized to guarantee under the LOCAL Act. At the time, the Farm Security and Rural Investment Act of 2002 (“Farm Bill”) was pending in

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<sup>25</sup> Memorandum Opinion And Order And Second Report And Order, *Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2- 12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates*, ET Docket No. 98-206, FCC 02-116 (released May 23, 2002).

<sup>26</sup> *NRTC Petition*, pp. 23-28.

<sup>27</sup> See Note 2, *supra*.

Congress with a proposed \$80 million in funding for the implementation of the LOCAL Act to augment \$20 million that was appropriated in Public Law 107-76.<sup>28</sup>

27. Since RUS published the Notice, the Farm Bill became Public Law No. 107-171, and the additional \$80 million in funding was enacted in Section 6404. It is our firm contention that the combined \$20 million appropriation and the \$80 million of additional funding were approved until expended or through the year 2006, when the program expires.

28. The recently approved funding -- totaling \$100 million -- should be more than adequate to support implementation of the LOCAL Act program's limit of \$1.25 billion in loan guarantees. Therefore, the potential problem that the Notice contemplates -- a lack of funds to implement the LOCAL Act -- is now moot.

29. Even if for some reason -- inexplicable to us -- the earlier \$20 million in appropriation were deemed to be for this fiscal year only, the \$80 million supports a loan guarantee amount of \$1.032 billion. Based on past projects, the Rural Interests estimate that \$1 billion would go far toward financing the construction and launch of at least two spot beam satellites to support local TV service throughout all of rural America.

30. We need to move forward with a program to bring local TV signals to rural Americans who currently are deprived of access to this important source of news, weather, community information and local entertainment.

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<sup>28</sup> *Agriculture, Rural Development, Food And Drug Administration, And Related Agencies Appropriations Act, 2002*, Pub. L.No.107-76 (2001).

**IV. The DBS Industry Will Adjust to the Satellite Home Viewer Improvement Act ("SHVIA") "Carry One, Carry All" Provision And Serve Smaller Markets With Assistance From The LOCAL Act.**

31. On January 1, 2002, DBS providers became subject to the "carry one, carry all" must-carry provisions of SHVIA. DBS providers must offer all local TV channels in any DMA where they offer even one. EchoStar has carried its objection to the rule all the way to the U.S. Supreme Court.<sup>29</sup> Unless the court reverses carry one, carry all, satellite carriers must adjust to the policy.

32. As we mentioned above, the emergence of spot beam satellite technology improves the efficiency of local signal distribution, and with the launch of additional Ku-band satellites, it becomes technically possible that EchoStar and DIRECTV could provide local channels to all 210 DMAs, even without combining their capacities, as proposed in the New EchoStar 1 Application.<sup>30</sup>

33. However, DIRECTV and EchoStar have shown an unwillingness to provide local channels in smaller markets on their own. While it appears to be technologically possible for both carriers to offer all broadcast signals to all Americans, the provision of local signals in smaller markets is not likely to generate enough profit to entice DIRECTV and EchoStar to build additional spot beam capacity for local signal distribution.

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<sup>29</sup> *SBCA, et al. v. FCC, et al.*, 275 F.3d 337 (4<sup>th</sup> Cir. 2001), Petition for A Writ of Certiorari, U.S. March 7, 2002, No. 01-\_\_.

<sup>30</sup> The NAB, for example, relying on the Applicants' own assumptions contained in the Joint Engineering Statement, demonstrated that each Applicant could separately use 46 (for DIRECTV) or 50 (for EchoStar) CONUS frequencies to carry all of the eligible local stations in all 210 DMAs, and also carry all of its existing national programming, with ample room to offer still more. *NAB Petition*, pp. 80-82. See *Application*, Joint Engineering Statement in Support of Transfer of Control Application, Attachment B, p. 6. See also Declaration of Walter Morgan, February 2, 2002 (Exhibit O to the *NRTC Petition*); Declaration of Walter Morgan, March 27, 2002 (Exhibit 2 to *NRTC Reply*).

34. The need for the LOCAL Act loan guarantee program is as necessary now as it has ever been to eliminate economic disincentives. The Rural Interests are considering the possibility of bringing a comprehensive plan to the RUS for the provision of local TV signals in rural markets. As concerned third parties working within the satellite industry, the Rural Interests could fill the void in local TV programming by funding the construction and launch of additional satellite capacity for local TV service within the guidelines of the SHVIA carry one, carry all provision. But the Rural Interests need access to the LOCAL Act loan guarantee program in order to provide this much-desired and critical service to rural consumers.

**V. The Rural Interests Urge RUS to Address Ongoing Technical Concerns Related to LOCAL TV Act Implementation.**

35. The Rural Interests have previously brought to the attention of RUS some technical concerns regarding the implementation of the LOCAL TV Act.<sup>31</sup> We urge RUS and the Board to use the greatest degree of permissible flexibility that will allow the program to be implemented in a manner that will achieve its goal of providing local TV signals throughout rural America, while protecting U.S. taxpayers from potential liability. We believe that RUS could strengthen the effectiveness of the LOCAL Act by adopting these clarifications:

- The assets of an affiliated company should be subject to indemnification and the collateral obligations of the primary applicant only when the affiliates' assets are needed to secure the loan guarantee.
- The value of collateral should remain fixed except in cases of fraud or abuse.
- RUS should use its discretion to waive or reduce nonpayment penalties for entities acting in good faith.
- RUS should waive a loan guarantee origination fee, which could be a costly impediment to achieving the goals of the LOCAL Act.

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<sup>31</sup> See Note 4, *supra*.

- Credit risk premiums should be kept to the lowest possible amount and/or imposed only when the LOCAL Act loan guarantee program experiences appropriations shortfalls.
- RUS should have no liens on assets securing a loan that are in excess of the unpaid balance.

Attached as Exhibit 5 is a more complete list and description of our suggestions as to how the legislation can be implemented to accomplish its worthy goals.

## **VI. Conclusion.**


36. The Rural Interests stand ready to assist the RUS in its fulfillment of the LOCAL Act's intent. Both the 106th and the 107th Congress have spoken on this issue. Two administrations, one of each party, have endorsed this approach to ensure that rural Americans will have the same access to local programming as their urban counterparts.

37. The telecommunications industry is subject to constant and rapid change, as evidenced by recent advancements in technology, actions by Congress and the courts, and the proposed Merger of the only two DBS providers. However, these changes do not alter the central issue at the heart of the LOCAL Act program – millions of rural Americans still do not have access to local broadcast signals. The Rural Interests urge the RUS to follow through with the intent of Congress and expedite its efforts to launch the LOCAL Act loan guarantee program.

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**May 30, 2002**

## **Exhibits**

<b><u>Exhibit</u></b>	<b><u>Description</u></b>
<b>1</b>	<b>Summary of NRTC <i>Petition to Deny</i> (February 4, 2002).</b>
<b>2</b>	<b>NRECA Comments (February 4, 2002).</b>
<b>3</b>	<b>CFC Comments (February 25, 2002).</b>
<b>4</b>	<b>EchoStar 'Flip-Flop' Chart.</b>
<b>5</b>	<b>Technical Concerns Related to LOCAL TV Act Implementation.</b>

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

<b>In The Matter Of</b>	)	
<b>Application Of</b>	)	
	)	
<b>EchoStar Communications Corporation,</b>	)	<b>CS Docket No. 01-348</b>
<b>General Motors Corporation, And Hughes</b>	)	
<b>Electronics Corporation</b>	)	
	)	
<b>For Consent For A Proposed Transfer</b>	)	
<b>Of Control</b>	)	
	)	
<b>To: The Commission</b>	)	

**PETITION TO DENY  
BY THE  
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

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**February 4, 2002**

## SUMMARY

EchoStar and DIRECTV already are successfully competing against each other -- and against cable. The Commission recently found that the number of DBS subscribers is skyrocketing -- an increase of 24% within the last year alone. Every day, DBS gains more than 8,500 subscribers. There is no economic necessity for EchoStar and DIRECTV to merge in order to compete, because the market is functioning effectively now with two healthy, facilities-based competitors.

The effect of the proposed EchoStar/DIRECTV Merger is readily apparent: in areas where cable is not available, the number of comparable multichannel video program distributors (MVPDs) would be reduced from two (EchoStar and DIRECTV) to one (New EchoStar); in areas where cable is available, the number would be reduced from three (EchoStar, DIRECTV and the local cable operator) to two (New EchoStar and the local cable operator).

Tens of millions of rural homes -- up to 25,000,000 or more -- are not passed by cable and have no access to any MVPD services except through EchoStar's DISH Network and Hughes' DIRECTV, the two currently competing providers of high powered Direct Broadcast Satellite (DBS) services. Additional millions have no access to digital cable services. If the Commission allows EchoStar to merge with Hughes, there would be a monopoly DBS provider throughout the country -- and *no* MVPD competition from any other comparable source in all areas not passed by digital cable.

In all of these areas, New EchoStar will determine in its sole discretion the particular programming that consumers will be able to receive. If New EchoStar decides to eliminate specific programs from its line-up, that programming will no longer be available to consumers.

In all of these areas, New EchoStar will attempt to set installation policies, consumer service standards, billing procedures, price and all other aspects of its MVPD offerings to consumers, unchecked by competition. If any consumers in these areas are dissatisfied with New EchoStar's programming, policies or prices, they will have no alternative but to accept whatever New EchoStar provides or to do without MVPD programming altogether. They will have no other choice.

Similarly, approximately 40,000,000 homes are not passed by cable modem or digital subscriber line facilities and have no access to high-speed Internet service except via satellite. Currently, there are only two competing providers of broadband satellite services using the Ku-band: StarBand, controlled by EchoStar, and DIRECWAY, owned by Hughes. The proposed Merger would combine these two entities and create a monopoly in the delivery of broadband services to rural Americans. It also would create an overwhelmingly dominant player in the delivery of advanced broadband services in the promising Ka-band, before any other competitors can get off the ground.

To justify their merger to monopoly, the Applicants offer a host of vague and unenforceable promises. To the millions of rural Americans who will have no alternative but to accept whatever programming, services and prices that New EchoStar would decide to provide, the Applicants respond with meaningless promises of uniform national pricing.

Promises of national pricing are no substitute for competition and will not protect rural Americans from the effects of a monopoly. The promises are legally unenforceable and easily gamed through various subsidies made available only to certain consumers, including special installation and equipment deals, additional program offerings and other benefits. Even EchoStar's CEO recently conceded that his national pricing plan will need to be flexible enough

to respond to cable promotions and rebates at the local level. NRTC's economic consultant shows that national pricing actually would lead to higher prices in both urban and rural areas.

None of the other claimed "justifications" for the proposed Merger provides a sufficient basis for the Commission to conclude that a grant of the Application would be in the public interest. The elimination of a rare facilities-based competitor on the mere claim that efficiencies will result would be grossly inconsistent with previous decisions and policies. As New EchoStar's own economist has recognized, deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it already has by limiting its use and raising its price.

The claim by New EchoStar's economist that EchoStar and DIRECTV do not compete is unbelievable and contradicts EchoStar's statements filed under penalty of perjury in recent litigation. It defies logic that two companies offering similar products in the same market do not compete against each other. For years, in numerous documented instances, EchoStar and DIRECTV have competed on price and service. In fact, competition has been rampant between EchoStar and DIRECTV and has driven each to provide better service, more advanced technologies and lower prices to consumers. This type of facilities-based competition, which the Commission has long encouraged, will be eliminated if the Merger is approved.

The recent investment by Vivendi Universal SA (Vivendi) raises additional concerns. The Applicants have attempted to cast the Vivendi deal as a simple carriage arrangement that does not affect the proposed Merger. In fact, it is a major equity deal with an entrenched programmer. The Applicants should be required to file all the relevant contracts concerning the new relationship between EchoStar and Vivendi. Given the Applicants' earlier statements to the Commission denying any intention to enter into vertically integrated arrangements with

programmers, legitimate questions about the accuracy and truthfulness of these statements are before the Commission.

The Application is clearly inconsistent with the public interest and the Commission's long established goals of promoting facilities-based competition and consumer choice in the delivery of multichannel video programming and broadband services. The Merger will eliminate consumer choice and result in higher prices, less innovation and lower quality service. These consequences will be especially profound in rural America, where millions of consumers will have no choice but to accept New EchoStar's programming, prices and services, or to do without multichannel video programming and broadband services altogether.

Accordingly, the Application should be denied.

\* \* \*

**EchoStar Communications Corporation,  
General Motors Corporation,  
Hughes Electronics Corporation,**

and

CW Docket No. 01-348

**Transferee.**

### For Authority to Transfer Control

**COMMENTS OF THE  
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

## I. INTRODUCTION

The National Rural Electric Cooperative Association (“NRECA”) submits comments in the above captioned proceeding<sup>1</sup> to share our insights into how the proposed merger of Hughes Electronics Corporation (“Hughes”) and EchoStar Communications Corporation (“ECC”), the two dominant providers of direct broadcast satellite (“DBS”) service – DIRECTV and the DISH Network – could affect TV viewers in the communities that NRECA members serve.

<sup>1</sup> See *In re the Consolidated Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control*, Public Notice, CS Docket No. 01-348/DA 01-3005, (Released December 21, 2001.)

NRECA is the not-for-profit, national service organization representing 930 rural electric systems that provide electric service to 35 million customers, or approximately 12 percent of the U.S. population. Rural electric cooperatives are located in 46 states and 2,500 of the nation's 3,128 counties. Many NRECA members also provide telecommunications services, including satellite television, broadband and dial-up Internet access, cellular telephone, and long distance telephone services, to their local rural communities.

Much of the debate surrounding the proposed merger seems based on the assumption that a combined ECC/Hughes would provide greater competition to cable TV operators in the nationwide multichannel video program distribution ("MVPD") market. Based on our experience, however, we do not expect that cable TV operators will be able to offer any type of MVPD competition in many of our members' local rural service areas. Consequently, after the merger the only provider of MVPD services in many of our members' service territories will be the new merged entity.

As stand-alone companies, ECC and Hughes appear to be extremely successful. In competition with each other, they provide highly valued services to rural television viewers today. It is unclear how a single merged entity – in a noncompetitive environment – could improve service to rural America.

In the public interest, we ask the FCC to ensure that the diversity and quality of video services to rural America is not reduced. We also seek assurance that the development and deployment of broadband Internet service nationwide, especially to the rural communities that do not currently have access to cable modem or digital subscriber line ("DSL") Internet, is not delayed. Therefore we urge the FCC to reject the proposed

merger of ECC and Hughes.

## **II. RURAL AREAS ARE UNLIKELY TO BE SERVED BY WIRED FACILITIES**

Eighty one percent of the communities served by NRECA's members are considered rural.<sup>2</sup> Rural electric cooperatives were created more than 60 years ago to wire rural America for electric service – areas where it proved to be uneconomic for investor-owned or publicly-owned electric utilities to extend service. Today, electric cooperatives still average just 6.6 customers per mile of electric distribution line and collect on average \$8,500 in annual revenue per mile of line. It is NRECA's belief that this low population density will continue to preclude the deployment of cable TV services in most of the communities served by NRECA members.

Indeed, the FCC's own research and analysis supports our belief. As the FCC's Eighth Annual Report on the status of video competition finds,<sup>3</sup> DBS is a vitally important business that ensures that rural Americans have access to MVPD services at least equivalent to those offered in urban areas. The report refers to the Satellite Broadcasting and Communications Association estimate that DBS subscribers make up 10 percent or more of pay TV market share in 45 states and as much as 40 percent market share in some rural states.<sup>4</sup> As compared to cable subscribers, the Commission found that "DirecTV subscribers are more likely to live in rural areas."<sup>5</sup>

NRECA knows that many rural communities, particularly very remote areas, have

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<sup>2</sup> The proportion of communities served by electric cooperatives that is classified as "rural" is 81.2% using 1990 U.S. Census data+.

<sup>3</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report, ("Video Competition Report")*, CS Docket Number 99-230, FCC 01-129 (January 14, 2002).

no cable service at all. Even in those areas of rural America where there is some cable service, cable service may not extend to the entire community, that is, areas “outside of town” where population densities are very low. A fairly recent study of broadband deployment in rural America illustrates this point. The study suggests that 72 percent of communities with populations greater than 250,000 have some type of cable-based broadband service, but less than one-fifth of one percent (< 0.20 percent) of communities under 1,000 have cable modems deployed.<sup>6</sup> This difference is reasonable given the costs associated with deploying cable and of upgrading cable facilities to provide broadband service.<sup>7</sup> The economic realities of low consumer density led the National Telecommunications and Information Administration (“NTIA”) to conclude that “Cable television providers are generally unwilling to extend their cables into rural areas where the subscriber density is less than ten (10) per mile.”<sup>8</sup> Therefore, absent significant increases in density, the rural communities where NRECA’s members serve, which are presently not passed by cable, are not likely to gain access in the near future.

In an April 2000 report, the NTIA and the Rural Utilities Service (“RUS”) calculated that cable TV service passes as few as 81 percent of U.S. homes, as opposed to the 97 percent widely publicized by the cable industry and adopted by the merger proponents.<sup>9</sup> More recently, the *New York Times* published a state-by-state analysis of

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<sup>4</sup> See *Video Competition Report* at p. 30.

<sup>5</sup> *Id.*

<sup>6</sup> See Brian Staihr, *The Broadband Quandary for Rural America*, The Main Street Economist, Center For The Study Of Rural America—Federal Reserve Bank of Kansas City (Aug. 2000) available at [http://www.kc.frb.org/RuralCenter/mainstreet/MSE\\_0800.pdf](http://www.kc.frb.org/RuralCenter/mainstreet/MSE_0800.pdf).

<sup>7</sup> See National Telecommunications and Information Administration, U.S. Department of Commerce, “Survey of Rural Information Infrastructure Technologies (Sept. 1995) at pp. 3-6), available at <http://www.its.bldrdoc.gov/its/spectrum/rural/rural.pdf>, and see *supra* note 6.

<sup>8</sup> See *supra* note 8 at pp.

<sup>9</sup> See, National Telecommunications and Information Administration and Rural Utilities Service, *Advanced Telecommunications In Rural America: The Challenge of Bringing Broadband Service to All Americans*,

housing units with cable access that shows seven states have 50-59 percent access; 15 states have 60-69 percent access; and 15 states have 70-79 percent access.<sup>10</sup> It should be noted that these figures for homes passed by cable at the national level include both analog and digital cable systems, even though the features associated with analog cable are far below those offered by digital cable and are not comparable to DBS.

In NRECA's experience, the estimate of homes with access to cable by the NTIA and RUS and the *New York Times* is much more reflective of the actual availability of cable services in rural America than the cable industry's figures cited by the merger proponents. We know that many rural homes within the service territories of our members do not have access to cable television services, and are not likely to gain access any time soon given the low population density. If rural Americans wish to receive MVPD services, they must subscribe either to DISH Network or DIRECTV. It is not surprising, therefore, that rural viewers in homes not passed by cable are most likely to be seriously disadvantaged if the ECC/Hughes merger is approved, leaving them without choice in their MVPD service provider.

### **III. ECHOSTAR'S DISH NETWORK AND HUGHES' DIRECTV ARE HIGHLY SUCCESSFUL BUSINESSES THAT CURRENTLY SERVE RURAL AMERICA WELL**

With more than 16 million viewers, DBS has grown to serve more than 18 percent

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("NTIA/RUS Report") (April, 2000).

<sup>10</sup> See *Look Up in the Sky! Big Bets on a Big Deal*, New York Times, Oct. 30, 2001 at C-1 (50-59 percent: Alaska, Arkansas, Mississippi, Montana, South Dakota, Utah, Vermont; 60-69 percent: Alabama, Idaho, Iowa, Kentucky, Louisiana, Maine, Missouri, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Virginia, Wisconsin, Wyoming; 70-79% Delaware, Florida, Georgia, Indiana, Kansas, Michigan, Minnesota, New Hampshire, North Dakota, Oregon, Pennsylvania, South Carolina, Texas, Washington, West Virginia).

of the MVPD marketplace.<sup>11</sup> As stand-alone entities, DIRECTV is the second largest MVPD with more than 10 million subscribers, and the DISH Network is the sixth largest MVPD with more than 6 million subscribers.<sup>12</sup> Hughes reported fourth quarter 2001 revenues for DIRECTV of \$1.518 billion in the U.S., an increase of 12 percent over fourth quarter 2000. ECC reported third quarter 2001 revenues for DISH Network of \$1.023 billion, an increase of 46 percent over third quarter 2000. Hughes also reported 405,000 DIRECTV net subscriber growth during fourth quarter 2001. ECC reported 360,000 DISH Network net subscriber growth for third quarter 2001. It is difficult to understand how eliminating competition between these two companies, which serve rural Americans so well today in competition with each other, would serve the public interest.

NRECA is not comforted by ECC/Hughes' promise of "national pricing" as a remedy for rural consumers' lack of choice in MVPD providers after the merger. That type of promise seems difficult if not impossible to enforce. Moreover, it highlights the fact that in a noncompetitive environment our rural consumers will be required to accept whatever programming or level of service (including equipment installations, billing procedures and customer complaint processes) that the merged entity decides to provide. After the merger, rural Americans will have no place to turn if they are dissatisfied with the programming choices or level of service provided by the new merged entity.

ECC and Hughes have stated that combining their spectrum resources could result in higher-quality services to their subscribers. For example, the parties have said that by working together, they will be able to provide local broadcast TV signals to "100 or more" TV markets, compared to the 36 and 41 markets that ECC and Hughes now serve,

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<sup>11</sup> See *Video Competition Report* at pp 29-30.

<sup>12</sup> *Id.*

respectively.<sup>13</sup> ECC and Hughes also claim that more efficient use of their spectrum would allow them to provide more premium programming, high-definition television channels and other advanced services.

These claims raise additional questions. If more efficient use of spectrum will allow the parties to provide local channels in the top 100 TV markets, what amount of efficiency would allow the parties to offer local service to all 210 Nielsen markets on their own, without the merger? Would the public interest be better served if each of these companies launched additional satellites on its own to provide local signals, premium programming and other services to all markets?

Under the ECC/Hughes plan, rural subscribers will not have the same level of video service that the combined companies plan to offer in urban areas, since their improved spectrum efficiency will allow them to upgrade service to little more than the top 100 TV markets. Most rural Americans in markets 101 to 210 will receive no local service whatsoever under their plan. Indeed, after the merger, competition between the two would no longer spur either of them to extend local service into new, rural markets or to provide new, advanced services not offered by the other.

#### **IV. RURAL AMERICA WILL BENEFIT FROM ACCESS TO HIGH-SPEED SATELLITE SERVICES**

Congress has recognized that the rollout of advanced telecommunications services, such as broadband Internet, should be available to *all* Americans.<sup>14</sup> The lack of

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<sup>13</sup> See *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control*, (filed December 3, 2001), at p. 28.

<sup>14</sup> See Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

advanced telecommunications services in rural areas, leaving many remote regions of the nation at an economic disadvantage, should be of keen concern to the FCC and a consideration in its review of the ECC/Hughes proposed merger. As the NTIA/RUS Report notes, the rate of deployment of broadband "has implications for the welfare of Americans and the economic development of our nation's communities."<sup>15</sup> We therefore strongly support the recent policy objectives set forth by Chairman Powell that "The Nation should commit to achieving universal availability of broadband."<sup>16</sup> High-speed telecommunications services can help address a number of important rural economic and social concerns, such as economic and community development, access to quality educational options and distant medical expertise. The assertions of the merger proponents with regard to their ability as a combined entity to deliver high-speed services are therefore of particular interest to NRECA and its members.

Currently, both companies offer a high-speed Internet service choice for rural consumers. ECC, working with a subsidiary of Gilat International, offers StarBand high-speed satellite Internet service. Hughes operates a similar service called DIRECWAY. For many consumers served by NRECA's members, these are the only available services faster than dial-up Internet access. The ECC/Hughes combination could result in a single satellite Internet provider for the foreseeable future in rural communities. NRECA believes that one of the FCC's goals should be to ensure that rural consumers receive video and Internet services that are at least equivalent to those offered to urban consumers. The current estimate is that 65 percent of the U.S. population has access to

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<sup>15</sup> See NTIA/RUS Report at p. 2.

<sup>16</sup> Michael K. Powell, Chairman, Federal Communications Commission, Press Conference, "Digital Broadband Migration" Part II (Oct. 23, 2001).

digital cable TV services that can support multichannel TV equivalent to DBS and cable modem service.<sup>17</sup> The great majority of the population served by digital cable is in urban areas. NRECA has long advocated for comparability in services – electric, telecommunications, and otherwise – for rural America. Our concern is that the proposed merger will be a major step backward in ensuring that the rural consumers served by our members receive that level of service if the proposed merger is approved.

#### IV. CONCLUSION

The FCC should not assume that cable, or telephone companies for that matter, will be able to build out wireline facilities in rural America that will equal the multichannel video and high-speed Internet services that satellite, cable and telephone companies provide in urban areas. NRECA knows that building wired facilities to rural communities is a very difficult and expensive undertaking. Cable and telephone companies will not be able to provide satellite-equivalent services to rural America.

The merger of ECC and Hughes will eliminate MVPD competition in all parts of the country that are not passed by cable. In the broadband market, the same problem will occur in areas not reached by cable modem or DSL services. This lack of competition will particularly disadvantage rural Americans, who are likely to suffer from higher prices, poorer quality service and other consequences of having only a single MVPD and satellite broadband provider. NRECA strongly urges the FCC to give serious consideration to these and other adverse impacts on rural America and to reject the proposed ECC/Hughes merger.

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<sup>17</sup> Figured cited by Peter Jarich, director of broadband research, The Strategis Group, during Webcast, "Residential Broadband: Cable Modems, DSL & Fixed Wireless," January 24, 2002.

Respectfully submitted,

NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION

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February 4, 2002

CS Docket No. 01-348

## I. INTRODUCTION

CFC fully shares the many concerns expressed by the National Rural Telecommunications Cooperative (“NRTC”) in its petition to deny the proposed merger. The proposed merger of ECC and Hughes would reduce the number of direct broadcast satellite (“DBS”) service providers from two – DIRECTV and EchoStar – to one. It also would consolidate the only two current satellite broadband providers (DIRECWAY and

StarBand) and stifle competition from new Ka-band broadband entrants as well. We urge the FCC to ensure that rural Americans continue to have access to a variety of affordable satellite television services from a diversity of sources, including a not for profit cooperative with its roots in rural America.

CFC is a not-for-profit cooperative whose mission is to provide its member utility systems — through their unified, collective strength — with an assured source of capital, state-of-the-art financial products, and business management services. CFC raises funds primarily through equity investments made by its cooperative utility owners and by raising funds in the capital markets. CFC board members represent both cooperative utility management and directors elected by consumers of local cooperatives.

We believe the FCC must reject the merger in order to ensure that rural Americans continue to receive access to satellite television and broadband services on competitive terms and conditions.

## **II. RURAL CONSUMERS DEPEND ON DBS FOR MULTICHANNEL VIDEO PROGRAM DISTRIBUTION (MVPD) SERVICES**

Using DBS technology, EchoStar and DIRECTV currently compete in delivering a wide variety of information and entertainment programming to rural America. The Satellite Broadcasting and Communications Association (“SBCA”) lists 10 states in which DBS penetration is 27 percent or more – up to as much as 40 percent<sup>1</sup> – compared to a national average DBS penetration of about 18 percent.<sup>2</sup> The list includes states such

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<sup>1</sup> From the SBCA’s Web site, <http://www.sbca.com/mediaguide/factsfigures.htm> (visited January 28, 2002).

<sup>2</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report, (“Video Competition Report”),* CS Docket Number 99-230, FCC 01-129 (January 14, 2002), at pp 29-30.

as Vermont, Mississippi, Arkansas, and Kentucky, where many small, rural communities often do not have access to competing cable TV services.

As NRTC noted in its petition to deny, up to 25,000,000 million or more rural households do not have access to any type of cable television services.<sup>3</sup> As a result, they depend solely on satellite technology to receive a diversity of MVPD services. If the merger of DIRECTV and EchoStar is approved -- and competition between the two is eliminated -- there will be no MVPD alternative for any of these households. All of them will be required to take service from the new DBS for profit monopoly or to do without it.

Additionally, as NRTC noted, "The continued viability of many of the existing rural, analog cable systems is very much in doubt. Many, including EchoStar's investment bank, believe that large numbers of rural cable operators will go out of business if they cannot afford to upgrade to digital and compete with EchoStar and DIRECTV."<sup>4</sup> With this anticipated reduction in the number of analog cable systems, even fewer rural American households will have access to any type of cable alternative if the merger is approved.<sup>5</sup>

The price impact of the EchoStar/DIRECTV merger on rural Americans will be staggering. Three different expert economists have shown that consumer welfare losses related

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<sup>3</sup> NRTC Petition to Deny, at pp. 5-20. See also Pegasus Communications Petition to Deny, at pp. 2-4; CWA Petition to Deny, at pp. 1-2; NRECA Comments, at pp. 3-5.

<sup>4</sup> NRTC Petition to Deny, at p. 20. NRTC also pointed out that only digital (not analog) cable is reasonably interchangeable with DBS. Id, at pp. 20-23.

<sup>5</sup> The American Cable Association, which represents small-market cable operators, predicts: "The proposed DBS monopoly will squeeze out its smaller market cable competitors through a combination of price levels below small cable's costs, bottleneck control of programming, and exploitation of small cable's disparate regulatory burdens. Widespread failure of smaller market cable systems and the concomitant public

to the merger will total \$600-700 million or more every year.<sup>6</sup>

And even if national pricing held down the price impact of the monopoly, rural Americans would still not receive any of the benefits traditionally associated with competition. For instance, as the American Antitrust Institute succinctly stated, " Even if the price is right, to whom is the rural customer supposed to turn when he believes the monopolist's service stinks?"<sup>7</sup> CFC particularly objects to the proposed merger because the remaining player would be a for profit monopoly whose primary objective is to enhance shareholder value, not to serve the rural consumer.

### **III. THE PROPOSED MERGER ALSO THREATENS TO ELIMINATE BROADBAND COMPETITION IN RURAL AMERICA**

Some rural cooperatives are just beginning to offer high-speed residential Internet service from the two existing Ku-band satellite services – DIRECWAY and StarBand. Hughes owns DIRECWAY. ECC currently controls 32 percent of StarBand, in a partnership with Gilat Satellite Networks Ltd., Microsoft, and ING Furman Selz Investments. Under earlier announced plans, ECC expects to increase its investment and eventually control 60 percent of StarBand.<sup>8</sup>

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interest harm are the predictable consequences. American Cable Association Petition to Deny at p. 9.

<sup>6</sup> NRTC Petition to Deny, Declaration of Dr. Paul W. MacAvoy, pp. 52-53; Pegasus Petition to Deny, Report of Daniel L. Rubinfeld, pp. 14-15, n.59; National Association of Broadcasters Petition to Deny, Declaration of J. Gregory Sidak, pp. 28-30.

<sup>7</sup> American Antitrust Institute comments at p. 3.

<sup>8</sup> "EchoStar Completes \$50 Million Investment in StarBand," press release, September 27, 2001, from EchoStar Web site, [http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=dish&script=410&layout=-6&item\\_id=210123](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=210123) (visited February 21, 2002).

ECC/Hughes also appears to have an interest in a majority of the companies that actively are working to establish future satellite Internet service in the Ka band. CFC agrees with NRTC, when it states that: "While EchoStar and Hughes are both well positioned to offer broadband service in rural America, an EchoStar/Hughes combination should not be the only player able to operate in a marketplace, especially one that is still in the early stages. Competition must be given a chance."<sup>9</sup>

In its petition to deny, NRTC pointed out that 30-40 million homes will never be covered by terrestrial broadband services (i.e., cable modem or digital subscriber lines).<sup>10</sup> As with video services, these homes rely on satellite technology to receive any broadband services. Under the proposed merger, their choice will be eliminated.

If the FCC approves the proposed merger, Hughes and EchoStar will control all of the Ku-band satellite broadband offerings and will be poised to dominate the nascent Ka-band market as well. Rural Americans, again, will have no choice in service provider. Further, consumers nationwide who wish to receive combined video and high-speed Internet service by satellite -- a huge competitive advantage for the provider -- will be required to accept bundled service from the new merged entity. No other entity stands ready to offer both services via satellite.

#### IV. CONCLUSION

Up to 25,000,000 or more rural households have no access to cable television service and must rely upon satellite technology to receive multichannel video programming. Without DIRECTV and EchoStar competing on the basis of service and

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<sup>9</sup> NRTC Petition to Deny at p. 56.

price, all of these households will have no choice but to accept whatever programming and prices the new merged entity decides to provide. Even under the merged entity's promise of "national pricing," experts predict that the consumer welfare loss from the merger will be \$ 600-700 million or more every year.

The same problem exists for broadband. The new merged entity will control access to satellite broadband delivery in the existing Ku-band as well as the developing Ka-band for the 30-40 million households located beyond the reach of terrestrial services (cable modem or DSL). All of these households will be unable to choose from among competing broadband providers based on service, price and a desire to be served by a local community provider. Additionally, the new entity will be the sole provider of bundled multichannel video and broadband satellite services throughout the country.

In light of the above, the proposed merger is clearly inconsistent with the interests of rural America. It should be denied.

Respectfully submitted,

NATIONAL RURAL UTILITIES  
COOPERATIVE FINANCE  
CORPORATION



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February 25, 2002

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<sup>10</sup> Id, pp. 44-45.

## ECHOSTAR/DIRECTV "FLIP-FLOP" CHART

**"We have a track record of doing exactly what we say we'll do."<sup>8</sup>**

-Charlie Ergen.

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
<b>The Availability Of Cable For Rural Consumers</b>	<p>"Millions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and EchoStar, there is no competition at all."</p> <p style="text-align: right;">-EchoStar Memorandum, Nov. 6, 2000, p. 12.<sup>9</sup></p> <p>"71% of DIRECTV customers live in areas able to receive cable television service."</p> <p style="text-align: right;">-DIRECTV 2001 Cable Comments, June 25, 2001, p. 13.<sup>10</sup></p>	<p>"First, nearly every household in America with a television is passed by cable: according to the FCC, 96.6 percent of TV households are passed by cable."</p> <p style="text-align: right;">-Willig Declaration, Dec. 3, 2001, p. 24.<sup>11</sup></p> <p>"[P]robably almost nobody watching this tonight [via satellite] doesn't have the opportunity to subscribe to cable if they'd like to."</p> <p style="text-align: right;">-Charlie Ergen, <i>Charlie Chat</i>, Nov. 12, 2001.<sup>12</sup></p>
<b>Carriage Of All Local Stations</b>	<p>"We will comply with must-carry on a single dish and carry all stations in all markets."</p> <p style="text-align: right;">-Charlie Ergen, <i>Judiciary Testimony</i>, March 6, 2002.<sup>13</sup></p>	<p>"However, the merged entity does not intend to carry all channels in every market unless the decision below is upheld."</p> <p style="text-align: right;">-SBCA Petition, March 7, 2002.<sup>14</sup></p>

<sup>8</sup> *Ergen Makes His Case*, Satellite Business News, December 21, 2001, p.10.

<sup>9</sup> Memorandum of Law In Support of Request for Rule 56(f) Continuance to Respond to DIRECTV Defendants' Motion For Summary Judgment, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed Nov. 6, 2000) (*EchoStar Memorandum*).

<sup>10</sup> Comments of DIRECTV, submitted August 3, 2001, in response to Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-191 (released June 25, 2001) (*DIRECTV 2001 Cable Comments*).

<sup>11</sup> Declaration of Dr. Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, p. 24 (December 3, 2001) (Attachment A to the *Application*) (*Willig Declaration*).

<sup>12</sup> SEC Form 425, filed by EchoStar Communications, Inc., *Transcript of "Charlie Chat,"* November 12, 2001, p.6 (November 16, 2001) (*Charlie Chat*).

<sup>13</sup> Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002 (*Judiciary Testimony*).

<sup>14</sup> *SBCA, et al. v. FCC, et al.*, 275 F.3d 337 (4<sup>th</sup> Cir. 2001), Petition for A Writ of Certiorari, U.S. March 7, 2002, No. 01-\_\_\_, n. 2 (*SBCA Petition*).

<b>Issue</b>	<b>Flip</b>	<b>Flop</b>
<b>The Number of DMAs That Will Be Served</b>	<p>"[With the merger] [w]e would commit to the top hundred markets."</p> <p><i>-Ergen House Judiciary Testimony, Dec. 4, 2001.<sup>15</sup></i></p>	<p>"And as the Applicants announce here for the first time, the merger will bring [DBS services to] every one of the 210 television Designated Market Areas in the United States."</p> <p><i>-Opposition, Feb. 25, 2002, p. ii (emphasis in original).</i></p>
<b>Competition Between EchoStar And DIRECTV</b>	<p>"DIRECTV and EchoStar react primarily to each other when setting equipment and service prices."</p> <p><i>-EchoStar Memorandum, Nov. 6, 2000, p. 12.</i></p> <p>"EchoStar is DIRECTV's closest competition."</p> <p><i>-EchoStar Memorandum, Nov. 6, 2000, p. 12.</i></p>	<p>"Executives at EchoStar and DIRECTV indicated that they monitor the pricing of the other firm, but that such pricing plays little (if any) role in their own pricing decisions."</p> <p><i>-Application, Dec. 3, 2001, fn. 5.</i></p> <p>"[T]he data show that the DBS services of the Applicants do not fiercely compete against each other, and the loss of existing competition from the merger is correspondingly limited."</p> <p><i>-Opposition, Feb. 25, 2002, p. 41.</i></p>
<b>DBS Customer Churn</b>	<p>"Many, if not most, consumers who would switch away from EchoStar if it raised its prices relative to all other subscription programming services would turn to DIRECTV."</p> <p><i>-EchoStar Memorandum, Nov. 6, 2000, p. 12.</i></p>	<p>"[T]he objective of each firm is to gain market share by luring customers away from the leading cable providers, not the customers of the other DBS firm."</p> <p><i>-Opposition, Feb. 25, 2002, p. 43.</i></p>

<sup>15</sup> See *Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market, Oversight Hearing Before the House Committee on the Judiciary*, 107<sup>th</sup> Congress, Serial No. 50, p. 66 (December 4, 2001) (statement of Charles Ergen, President and CEO, EchoStar Communications Corporation) (*Ergen House Judiciary Testimony*).

Issue	Flip	Flop
<b>Customers Abandoning the DBS Platform</b>	<p>"Absent a merger, there is a profound risk that DBS will devolve from its current position in the MVPD market as a quality and innovations leader to a lesser alternative that will cause its customers to abandon the DBS platform."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 38.</p>	<p>"DIRECTV in the U.S. expects to have a stellar year, by bringing over a million new subscribers."</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.<sup>16</sup></p> <p>"Based on the quarter-to-date performance of DIRECTV U.S., we expect to significantly exceed our guidance for net new subscriber additions in the first quarter [of 2002] . . ."</p> <p>-Jack Shaw, <i>Hughes Press Release</i>, March 21, 2002.<sup>17</sup></p> <p>"Total revenue for the quarter was 1.15 billion, an increase of 13% over last quarter, and 43% better than the same period a year ago. Revenue for the year was 4 billion, an increase of 47% over 2000. Continued subscriber growth and higher revenue per subscriber were the key drivers behind this increase. We currently expect 2002 revenue to be approximately 20 to 25% higher than 2001 revenue."</p> <p>-Michael McDonnell, CFO, EchoStar, <i>EchoStar Investor Call</i>, March 4, 2002.</p>
<b>Competition Against Cable</b>	<p>"In the unlikely event that the merger does not receive regulatory approval, I am absolutely convinced that HUGHES will be a very strong company, with many new strategic options available to increase value."</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>"[T]he two firms must merge to stay competitive with ... cable operators."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 47.</p>

<sup>16</sup> SEC Form 425, filed by Hughes Electronics Corporation, *Transcript Of The Fourth-Quarter And Year-End Earnings Call* (January 15, 2002) (*Hughes Investment Call*).

<sup>17</sup> "DIRECTV U.S. to Substantially Exceed First Quarter 2002 Expectations With Over 325,000 Net New Customers," Press Release of Hughes Electronics Corporation, March 21, 2002 (*Hughes Press Release*).

<b>Issue</b>	<b>Flip</b>	<b>Flop</b>
<b>The Meaning of National Pricing</b>	<p>"We offer nationwide pricing today and we're willing to commit to this going forward so that rural areas will get the advantages of competitive prices occurring in urban areas."</p> <p><i>-Ergen House Judiciary Testimony, Dec. 4, 2001 p. 13.</i></p>	<p>"The ability to offer local promotions for installation and equipment will not undermine the effectiveness of national pricing as a constraint."</p> <p><i>-Opposition, Feb. 25, 2002, p. 69.</i></p>
<b>Vertical Integration</b>	<p>"Unlike most large cable operators, [EchoStar] has no ownership stake in any programming producer, and the Applicants do not intend to pursue a strategy of vertical integration with programmers post-Merger."</p> <p><i>-Application, Dec. 3, 2001, p. 6.</i></p>	<p>"The Applicants hereby advise the Commission that on December 14, 2001, [EchoStar Communications Corporation] signed definitive agreements relating to a transaction with Vivendi Universal, S.A . . . Under the Agreement, Vivendi will make a \$1.5 billion investment in [EchoStar Communications Corporation] . . . As part of the transaction [EchoStar Communications Corporation] has also agreed to carry 5 new Vivendi channels."</p> <p><i>-Vivendi Letter, Dec. 18, 2001.<sup>18</sup></i></p> <p>"We're not opposed to taking a minority interest in a content provider on certain occasions."</p> <p><i>-Charlie Ergen, EchoStar Investment Call, March 4, 2002.</i></p>
<b>Favorable Programming Deals</b>	<p>"Because of their relatively small market shares, EchoStar and DIRECTV have not enjoyed the market position necessary to obtain favorable programming deals available to cable."</p> <p><i>-Opposition, Feb. 25, 2002, p. 125.</i></p>	<p>"[W]e have I think historically always been able to reach agreement with the particular programmers to something we think is fair for our consumers, and at a price that we think is fair."</p> <p><i>-Charlie Ergen, EchoStar Investment Call, March 4, 2002.</i></p>
<b>Entry Barriers to the DBS Market</b>	<p>"There are significant entry barriers to the DBS and/or High Power DBS market."</p> <p><i>-EchoStar Memorandum, Nov. 6, 2000, p. 12.</i></p>	<p>"[O]ther [satellite] companies have ample opportunity to use satellite spectrum and orbital locations . . . to introduce additional competition in the MVPD market."</p> <p><i>-Opposition, Feb. 25, 2002, p. 49.</i></p>

<sup>18</sup> Ex Parte Notice, Submitted by Counsel for General Motors Corporation and Hughes Electronics Corporation and Counsel for EchoStar Communications Corporation, Docket No. 01-348, p. 2 (December 18, 2001) (*Vivendi Letter*).

<b>Issue</b>	<b>Flip</b>	<b>Flop</b>
<b>Analog Cable Versus DBS</b>	<p>"Old, analog, rotting miles of cable . . . Once you've experienced digital satellite, you're not rushing out to get cable."</p> <p>-Charlie Ergen, <i>Denver Post Interview</i>, Oct. 5, 1997.<sup>19</sup></p>	<p>"Even analog cable operators historically have had tremendous advantages over DBS operators . . ."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 36.</p>
<b>C-Band As Competition To DBS</b>	<p>"Indeed, the size and cost of these dish antennas have rendered C-band technology largely obsolete."</p> <p>-<i>EchoStar Amended Complaint</i>, April 5, 2001, p. 10.<sup>20</sup></p>	<p>"[C-band] products remain very attractive, particularly in areas where dish size is not important."</p> <p>-<i>Application</i>, Dec. 3, 2001, p. 40.</p>
<b>The Cable Industry's Rollout of Digital Cable</b>	<p>"Where [the cable industry] has come out in general [with digital cable], as they have done, and advertised in a market, they really raised the awareness about digital television in the marketplace. We have seen strong customer growth, and an increase in the total market. It increases for us."</p> <p>-Roxanne Austin, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>"If EchoStar and DIRECTV are to continue to succeed, they must match . . . the dire competitive threat posed by the [digital] upgrade of these incumbents' systems."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 38.</p>
<b>The Cable Industry's Bounty Programs</b>	<p>"[D]igital cable is profoundly threatening to DBS. Among other things, digital cable: . . . has led the large cable multiple system operators to target DBS much more aggressively than in the past, including with . . . 'dish bounties,' and other satellite specific promotions."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 37.</p>	<p>"The [bounty program] is a very poor economic model for them . . . I think it's a very poor financial model for them. We will probably watch that, and if we see somebody doing something stupid, we'll take advantage of it . . ."</p> <p>-Charlie Ergen, <i>EchoStar Investment Call</i>, March 4, 2002.</p>
<b>The Product Market</b>	<p>"DBS is in a separate product market from alternative sources of programming, including cable television."</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>"EchoStar and DIRECTV compete in the market for Multichannel Video Program Distribution (MVPD)."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 33.</p>

<sup>19</sup> *Ergen On The Edge*, Denver Post, October 5, 1997, J-1 (*Denver Post Interview*).

<sup>20</sup> Amended Complaint, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed April 5, 2001) (*EchoStar Amended Complaint*).

Issue	Flip	Flop
<b>Competitive Broadband Offerings</b>	<p>“[F]rom the Hughes standpoint, we truly believe that broadband is here. And we have competitive offerings, if you just go to the satellite-based offering that we have, a competitive offering.”</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>“[T]he merger of EchoStar and Hughes will <i>create</i> for the first time a truly competitive broadband alternative to DSL and cable modem service . . . consumers today located in areas served by DSL or cable modems lack access to effective satellite broadband competition.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 80 (emphasis in original).</p>
<b>Consumer Broadband Services</b>	<p>“[U]sing Ka-band satellite systems, will satisfy growing consumer demand for broadband services, and will be a significant step towards bridging the digital divide between urban and rural areas.”</p> <p>-<i>EchoStar/VisionStar Application</i>, Dec. 15, 2000, p. 9.<sup>21</sup></p>	<p>“Nor could [EchoStar or DIRECTV] standing alone deploy on a timely basis an advanced residential broadband service of mass scale and appeal at an affordable price.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, pp. 80-81.</p>
<b>The Critical Mass For Broadband Deployment</b>	<p>“The combination of EchoStar and VisionStar will help create the critical mass, scale efficiencies and realistic chances of commercial success that will help both companies to deploy Ka-band satellites as expeditiously as possible.”</p> <p>-<i>EchoStar/VisionStar Application</i>, Dec. 15, 2000, p. 5.</p>	<p>“EchoStar currently does not have access to sufficient spectrum, orbital locations or capital resources to achieve (our) targets. All of these limitations, however, can be overcome by combining the resources of [Hughes and EchoStar] once the merger is approved.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 101 (discussing EchoStar’s limited Ka-band development).</p>
<b>The Use of Theoretical Analysis</b>	<p>“[P]roper competition analysis is limited to alternatives that are ‘practical in the business situation faced by the merging firms’ and should not rely on alternatives that are ‘merely theoretical.’”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 8.</p>	<p>“The Commission has reported that it is technically feasible for a new terrestrial service, which the Commission has dubbed Multichannel Video Distribution and Data Service (MVDDS) to share spectrum allocated to DBS in the 12.2 – 12.7 GHz band.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 53.</p>

<sup>21</sup> Application for Consent to Transfer of Control Over Authorization, File No. 200-SAT-P/LA-95 (filed December 15, 2000) (EchoStar/VisionStar Application).

Issue	Flip	Flop
<b>Regulation vs. Competition</b>	<p>“Regulation as a tool for facilitating broadband deployment . . . has historically led to market inefficiencies.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 115.</p>	<p>“New EchoStar will commit to a [regulated] nationwide pricing policy for basic broadband services that will translate effective competition in urban areas into benefits to all households for broadband service, just as it will for MVPD services.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 118.</p>
<b>A Monopoly’s Willingness To Provide Innovative Services</b>	<p>“[T]he proposed merger offers the possibility of substantial efficiency improvements . . . which would directly benefit DBS consumers by providing an expanded array of services.”</p> <p>-<i>Willig Declaration</i>, Dec. 3, 2001, p. 12.</p>	<p>“As is well documented in the literature of economics, monopolists do not invest the full amounts required for economic efficiency when they are provided with monopoly returns on their investments.”</p> <p>-<i>Willig Letter</i>, Dec. 11, 2001.<sup>22</sup></p>

## NRTC, NRECA, and CFC Suggestions on Implementing the LOCAL TV Act

### 1. Affiliate Assets

Under the Act, the Board is charged with the responsibility of ensuring the existence of adequate collateral to secure any loan guarantee (Section 1005(b)(2)(A)). To that end, the Board may determine whether the collateral "shall consist solely of assets of the applicant, any affiliate of the applicant, or both (whichever the Board considers appropriate)..." (Section 1005(b)(2)(B)). In the event that the applicant's assets, standing alone, are inadequate to support the loan guarantee, the Board may exercise its discretion and require collateral from an affiliate (Section 1004(d)(3)(B)(iii)).

This same process for ensuring the adequacy of collateral is described in the Report of the Senate Committee on Banking, Housing and Urban Affairs. According to the Report, "the Board must determine that the collateral is equal to the unpaid balance of the loan amount covered by the loan guarantee. *If such collateral is of a lower amount, then the collateral of an affiliate of the applicant must be added to the existing collateral.*" (Emphasis added, Senate Report No. 106-243, p. 6, 2000).

In other words, additional collateral may be required from an affiliate if the Board determines that a loan guarantee application has not been sufficiently collateralized by the applicant. If the value of the collateral provided by the applicant is equal to the unpaid balance of the loan amount covered by the guarantee, then there is no reason for the Board to require additional collateral from an affiliate.

In prescribing regulations to implement the provisions of the Act, the Administrator is required to "set forth the circumstances in which an applicant, together with any affiliate of an applicant, shall be treated as an applicant for a loan guarantee under this Act." (Section 1004(b)(2)(D)). We urge the Administrator to adopt the following rule clarifying that the assets of an affiliate will be subject to the obligations of the applicant only if the assets of the affiliate are used to secure the loan guarantee.

**"Assets of Affiliates.** In the event it is determined by the Board that the value of the collateral provided by an applicant is at least equal to the unpaid balance of the loan amount covered by the loan guarantee (the "Amount"), additional collateral shall not be required by any affiliate of the applicant. Additional collateral shall be required by an affiliate only in the event it is determined by the Board that the value of the collateral provided by the applicant is less than the Amount. In such event, the aggregate value of the collateral provided by the applicant and the affiliate shall not be required to exceed the Amount."

## **2. Indemnification**

The term "affiliate" is defined in the Act to mean any person or entity that controls, or is controlled by, or is under common control with, another person or entity. In addition, it "may" include individuals who are directors or senior management officers of an affiliate, and shareholders controlling more than 25 percent of the voting securities of an affiliate or more than 25 percent of the ownership interest in an affiliate not organized in stock form (Section 1010(1)). The United States shall be indemnified by "any" affiliate (acceptable to the Board) for "any" losses that the United States incurs as a result of a judgment, breach, violation, penalty or other circumstance by the applicant or "any" of its affiliates (Section 1005(o)(1)).

This indemnification provision, which on its face appears to expose any affiliate (individual or corporate) to liability whether or not the assets of the affiliate were used to collateralize the loan guarantee, must be read in light of the statutory purpose of imposing restrictions on affiliates only if necessary to increase the level of collateral supporting the loan guarantee application (Section 1004(d)(3)(B)(iii)). It would serve as a serious disincentive to any entity considering participation in the loan guarantee program if all assets of all individual and corporate affiliates were automatically placed at risk of indemnification even though those assets were not used in any way to support the applicant's loan guarantee application. We urge the Administrator to adopt the following rule clarifying that the assets of affiliates will not be subject to indemnification if those assets were not used to secure the loan guarantee.

**"Indemnification.** The United States shall be indemnified by an affiliate of an applicant for any losses specified in Section 1005(o) of the Act only to the extent that the assets of the affiliate were used to secure the loan guarantee under the Act. Assets of an affiliate that were not used to secure the loan guarantee shall not be subject to indemnification."

## **3. Downward Adjustments in Collateral**

The Board "may" adjust downward the value of any collateral securing the loan if the Board reasonably believes that such an adjustment is appropriate (Section 1005 (b)(2)(C)). We are aware of no similar restriction in the private capital market or other Government programs whereby the value of assets used to secure a loan can be subsequently adjusted downward. Nor are the consequences of a downward adjustment in collateral readily apparent under the Act.

The possibility of a floating, downward adjustment in the value of the collateral would create continuing uncertainty for applicants and could seriously undermine their business planning efforts. In light of the important public interest objectives to be served through the loan guarantee program, a downward adjustment in collateral should be used sparingly in only the most extreme and compelling circumstances. Accordingly, we urge the Administrator to adopt a rule stating that the value of the collateral will remain fixed except in instances involving fraud or abuse:

**"Downward Adjustments in Collateral.** The value of collateral securing a loan guaranteed under this Act shall be adjusted downward by the Board only if the Board makes a finding that such an adjustment is appropriate as a result of fraud or abuse by an applicant or any affiliate of the applicant."

#### **4. Penalties**

If an applicant fails to meet its stipulated performance schedule, the Act provides that the Administrator "may" assess and collect a penalty not to exceed 3 times the interest due (Section 1005 (f)(2)). It is unclear on the face of the Act whether the penalties should be based on the interest due for the life of the loan or for a shorter period. In either event, under this provision there is no question that substantial penalties could be imposed on applicants for failure to meet the performance schedule. Again, we are aware of no similar punitive provisions in the private capital market or other Government programs.

It is apparent from all Comments submitted in this proceeding that there are a number of significant hurdles and uncertainties involved in bringing local television service to rural America. Considering these challenges and the substantial public interest benefits offered by the provision of this type of service, the Administrator should forego any penalty when an applicant has acted in good faith but has fallen behind in its performance schedule.

Rather than imposing penalties equal to 3 times the interest due, the threat of which could well discourage an applicant from undertaking the task of serving rural America, we urge the Administrator to work cooperatively with applicants to address any unintentional shortfalls in the performance benchmarks. If necessary and appropriate in light of changed circumstances, the performance schedules should be adjusted as needed and authorized. The legislation specifically authorizes such changes, "*The Board may approve the adjustment of any term or condition of a loan guarantee . . .* (Emphasis added, "Section 1005(e)).

The Small Business Regulatory Enforcement Act of 1996 authorizes RUS and other agencies to reduce or waive any civil penalties for violations of a statutory or regulatory requirement by a small entity (See, 5 U.S.C. § 601, note (2000)). That same type of approach should be used by RUS to facilitate the provision of local television service to rural areas. We encourage RUS to adopt the following rule:

**"Penalties.** In the event an applicant or its affiliate fails to meet a stipulated performance schedule as a result of the applicant's or affiliate's failure to act in good faith, the Administrator may assess against and collect from the applicant or affiliate a penalty not to exceed 3 times the interest due on the guaranteed loan. The Administrator shall not assess against or collect from an applicant or affiliate any penalty if the applicant or affiliate failed in good faith to meet a stipulated performance schedule."

## **5. Origination Fee**

Under the Act, the Board shall charge and collect from an applicant a reasonable application fee to cover the cost of the Board in making necessary determinations and findings with respect to the application (Emphasis added, Section 1005(n)(1)). In addition, the Board shall charge and the Administrator "may" collect a loan guarantee origination fee (Section 1005(n)(2)). The application fee (which is required) and the origination fee (the collection of which is discretionary) shall be used to offset administrative costs under the Act, including costs of the Board and the Administrator. The aggregate amount of the fees shall not exceed the actual amount of administrative costs under the Act.

The application fee, by definition, will be sufficient to cover the Board's costs in making necessary determinations and findings relative to the application. A loan guarantee origination fee--on top of the application fee--may be used to offset certain undefined administrative costs but is unnecessary to offset the Board's costs relative to the most key aspects of the application.

As noted above, RUS is authorized under the Small Business Regulatory Enforcement Act of 1996, to reduce or waive penalties for small businesses (See, 5 U.S.C. § 601, note (2000)). An extra origination fee under these circumstances is likely to act as yet another costly impediment for entities attempting to deliver an important public service to rural Americans. To facilitate the provision of local service in rural America, and to avoid unnecessarily burdening applicants with additional and unnecessary expenses, we urge the Administrator to consider adopting the following rule waiving all origination fees in their entirety:

"Loan Guarantee Origination Fee. The Administrator shall not collect a loan guarantee origination fee with respect to the issuance of a loan guarantee under the Act."

## **6. Credit Risk Premiums**

If appropriations of budget authority are insufficient to cover the cost of a loan guarantee (i.e., any shortfall between a guaranteed amount paid pursuant to the Act and the net proceeds earned upon liquidation of all assets used as collateral for the loan, Senate Report No. 106-243, p. 6, 2000), the Board "may" establish and approve the acceptance of credit risk premiums (Section 1004(h)). To the extent the appropriations are sufficient to cover the cost, the credit risk premium shall be reduced proportionately. The Board shall determine the amount of any credit risk premium on the basis of certain criteria contained in the Act, including the financial and economic circumstances of the applicant, the schedule of loan disbursements, the business plans of the applicant, any financial commitment from a broadcast signal provider, and the concurrence of the Director of the Office of Management and Budget.

Section 1011(a) of the Act specifically authorizes appropriation for fiscal years 2001 through 2006 of such amounts as may be necessary for the cost of loans guaranteed under the Act. Section 1011(b) authorizes to be appropriated such sums as may be necessary to carry out the provisions of the Act, other than the cost of the loan guarantees.

Although credit risk premiums will be unnecessary if Congressional appropriations fully reflect the costs of the loans guaranteed under the Act and the costs in carrying out the provisions of the Act, if imposed they will add to the expenses of applicants seeking to provide rural local television service. Accordingly, we urge the Administrator to adopt the following rule to the effect that credit risk premiums will be imposed only in the event of an appropriations shortfall and, if imposed, will be kept to the lowest practical amount.

"Credit Risk Premiums. The Board shall establish and approve the acceptance of credit risk premiums only to the extent that appropriations of budget authority are insufficient to cover the cost of the loans guaranteed under the Act and such other sums as may be necessary to carry out the provisions of the Act. If imposed, credit risk premiums shall be kept to the lowest practical amount."

## 7. Liens

The Administrator will have liens on assets securing the loan, which are superior to all other liens on such assets. The value of the assets subject to the liens shall be "at least" equal to the unpaid balance of the loan amount covered by the loan guarantee or that value approved by the Board under Section 1004(d)(3)(B)(iii) and Section 1005(b)(3). The statutory superiority of the Administrator's lien may well create financing challenges for applicants (for instance, when assets are subject to pre-existing liens), we urge RUS to minimize any additional, unnecessary burdens.

The interests of the United States should be fully protected with liens covering -- not exceeding -- the unpaid loan amount. Although the Act provides that the Administrator's lien shall be "at least" equal to the unpaid balance of the loan amount, there is no apparent public policy reason why the Administrator's liens on assets should ever exceed the unpaid balance. Accordingly, we urge the Administrator to adopt the following rule:

"Liens. In no instance shall the Administrator have liens on assets securing the loan which are in excess of the unpaid balance of the loan amount covered by the loan guarantee."

## 8. "Stripping"

A loan guarantee under the Act shall have no force or effect if any part of the guaranteed portion of the loan is transferred separate and apart from the unguaranteed portion of the loan (Section 1005(d)). Although the Board is authorized to approve the adjustment of any term or condition of a loan guarantee under circumstances designed to protect the financial interests of the United States (Section 1005(e)), the prohibition against stripping appears to be statutorily required. If stripping of the loan guarantee is permitted by the statute, however, we believe that under certain limited circumstances it may further the basis and purpose of the Act without jeopardizing the financial interests of the United States. We urge consideration of the following rule:

"Stripping. A loan guarantee under this Act shall have no force and effect if any part of the guaranteed portion of the loan is transferred separate and apart from the

unguaranteed portion of the loan, unless such transfer is approved in advance and in writing by the Board. The Board shall approve such transfers only upon written application and clear and convincing evidence that the stripping of the guaranteed portion of the loan shall further the provision of local television service in rural America without jeopardizing the financial interests of the United States or otherwise violating any provision of Section 1005(e) regarding the adjustment of any term or condition of the loan guarantee."

If RUS determines that the stripping of the loan guarantee is statutorily prohibited and is not subject to waiver by the Board or the Administrator, we urge RUS to recommend to Congress that the blanket restriction on stripping be reconsidered in future legislation.

#### **9. Additional Considerations**

Under the Act, the Board is required to give priority in the approval of loan guarantees, first to projects that will serve households in nonserved areas, and second to projects that will serve households in underserved areas. In both instances, the Board must balance projects that will serve the largest number of households with projects that will serve remote, isolated communities in areas that are unlikely to be served through market mechanisms. Within each category, the Board shall consider the project's estimated cost per household and give priority to those projects that will provide the highest quality service at the lowest cost per household. Further, the Board shall support the use of loan guarantees for projects that will serve households not likely to be served in the absence of loan guarantees under the Act (Section 1004(e)).

In the Joint Comments NRTC, NRECA and CFC filed in this proceeding, on April 13, 2001, we urged RUS to consider, when granting applications for loan guarantees, the not-for-profit status of applicants, as well as their existing ties to the local communities they propose to serve. As explained, the entities best able to bring local service to rural America are those with a not-for-profit orientation, pre-existing ties to the local communities and a special motivation to serve those communities. These types of entities are particularly motivated by community service and need not demand high rates of return on their investments to satisfy shareholders.

We noted that a not-for-profit national organization comprised of members actively involved in their local communities would be especially well positioned to satisfy the broad goals of the Act, which are remarkably similar to the goals in the early days of the rural electrification and telephone programs: delivery of a critical service -- taken for granted by most Americans -- to America's rural communities. The success of these rural programs was largely attributable to the rural utility cooperatives organized in response to the establishment of the Rural Electrification Administration ("REA") and related government programs. Then -- as now -- large, for-profit, private sector providers were hesitant to construct the necessary infrastructure due to the high costs associated with the build-out, coupled with its limited financial return. As a result, the ultimate solution for rural utilities was member-owned cooperatives and small, locally owned businesses which were newly organized and established for the sole purpose of providing essential services otherwise not available in rural areas. The success of this effort would not have been possible without the assistance of REA.

Consistent with the criteria established in the statute for granting priority in the issuance of loan guarantees, NRTC, NRECA and CFC urge RUS to consider the remarkable, successful history of service to rural America through the rural electrification and telephone programs. These programs have long recognized the value and importance of serving households in nonserved and underserved areas. They traditionally have brought service to large rural areas and remote, isolated communities that were unlikely to be served through market mechanisms. Due to their not-for-profit, member-owned cooperative structure or strong local presence, these entities have a historic record of providing the highest quality service at the lowest cost per household throughout their rural service territories.

All of these elements of the rural electrification and telephone program are consistent with the statutory criteria established in the Act for special consideration of applications for loan guarantees (Section 1004(e)). Accordingly, we urge RUS to adopt the following rule:

"Additional Considerations. To the maximum extent practicable, the Board shall consider in the approval of applications for loan guarantees the not-for-profit status of applicants, as well as their existing ties to the local communities they propose to serve."